UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

FRESH & EASY NEIGHBORHOOD MARKET, INC.,	)	
Respondent,	)	
-and-	)	Case No. 28-CA-064411
MARGARET ELIAS,	)	
Charging Party	)	Hon. Joel P. Biblowitz Administrative Law Judge

ANSWERING BRIEF OF THE RESPONDENT

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Respondent Fresh & Easy Neighborhood Market, Inc. ("Fresh & Easy" or "Company") submits the following Answering Brief to the Acting General Counsel's Exceptions to the Decision of the Administrative Law Judge.

As noted in its Exceptions and supporting Brief, the Acting General Counsel excepts to three of Administrative Law Judge ("ALJ") Joel P. Biblowitz's findings in his April 23, 2012 Decision [JD(NY)-14-12]: (1) Fresh & Easy did not orally promulgate an allegedly "overly-broad and discriminatory rule prohibiting employees from obtaining statements from their coworkers regarding allegations of sexual harassment," in violation of Section 8(a)(1) of the Act; (2) the Company did not allegedly interrogate Charging Party Margaret Elias ("Elias"), in violation of Section 8(a)(1) of the Act; and (3) Elias was not engaged in protected concerted activity when she allegedly "asked coworkers to sign [a] statement regarding a note written on a whiteboard in the employee break room that contained sexual innuendo." GC Brief, p. 1.[1]

The Acting General Counsel otherwise asserts that "[i]n all other respects, the findings of the ALJ are appropriate, proper, and fully supported by the credible record evidence." *Id.* This includes the ALJ's dismissal of the Complaint allegations that Fresh & Easy purportedly created an impression of surveillance of protected concerted activities, and threatened employees with unspecified reprisals because of their protected concerted activities. *See* ALJD 1. Fresh & Easy does not except to the ALJ's findings related to its confidentiality rule and notification to employees as to the 2009 change to its solicitation/distribution rule. *Id.* at 12.

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[1] The Acting General Counsel's exhibits are referenced "GC ___;" Fresh & Easy's exhibits as "R __;" the transcript as "Tr. ____;" the ALJ's Decision as "ALJD ___;" and the Acting General Counsel's Brief as "GC Brief ___."

I. SUMMARY

What remains of this case relates to actions of Fresh & Easy's Employee Relations Manager, Monyia Jackson ("Jackson"), in investigating a personal sexual harassment complaint made by Elias, as well as complaints about Elias herself by other employees objecting to her inappropriate behavior in advancing her harassment claim.

Jackson did not "orally promulgate an overly broad and discriminatory rule" prohibiting employees from obtaining coworker statements regarding sexual harassment allegations. Rather, the ALJ found that employees had complained to Fresh & Easy about Elias' aggressive and hostile conduct in obtaining signatures from them on a witness statement she prepared. The ALJ further determined that Elias had engaged in such behavior. Moreover, the ALJ also found that Elias altered her witness statement after she procured other employees' signatures on it. Elias testified to the contrary; and, in reaching his conclusions, the ALJ thoroughly discredited her in the ensuing "major credibility conflict," holding that it "is not a difficult determination."[2] ALJD 10.

With Elias having engaged in unwanted conduct towards other employees, and having compromised the integrity of the investigation of her own harassment complaint, the ALJ found that all Jackson did was request Elias not to obtain any further witness statements so she could fairly complete the investigation that Elias had sought. The ALJ also determined that Jackson told Elias that she could discuss the situation with other employees, and could ask them to be witnesses for her. The ALJ similarly found that Jackson did not restrict Elias' right to bring

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[2] The Acting General Counsel asserts that "[r]eversal of the ALJ's findings do not require changes to the credibility resolutions made by the ALJ[.]" GC Brief, p. 2. In fact, the findings reached as a result of the ALJ's credibility resolutions compel the affirmance of the ALJ's dismissals.

harassment complaints in the future, nor -- as the Acting General Counsel tacitly acknowledges by not excepting to the ALJ's holding -- disciplined Elias or threatened her with any discipline.

Jackson's communication was narrowly tailored to the specifics of Elias' established conduct, and was lawful under extant Board law. *See* ALJD 9-11. Indeed, it is difficult to see how Jackson could have acted any differently, given Elias' behavior and the Company's obligation under federal anti-discrimination law to conduct a proper and impartial investigation of Elias' sexual harassment complaint.

The Acting General Counsel's allegation of unlawful interrogation likewise is hard to comprehend. Elias initiated a personal harassment complaint to Fresh & Easy which Jackson duly investigated, including ascertaining -- necessarily -- whether there were any witnesses to the incident. Moreover, other employees came to the Company with their own objections to Elias' demanding their signatures on her witness statement. These complaints also were an appropriate subject of investigation.[3]

The ALJ's dismissal of the allegations against Jackson was well founded. The Acting General Counsel did not establish any of the predicates to a Section 8(a)(1) violation: (1) Elias was not engaged in concerted activities; (2) her activities at issue were not for the purpose of "mutual aid or protection;" (3) her conduct was not protected by the Act; and (4) she was not restrained, etc., in the exercise of any rights guaranteed by Section 7.

Further, even if the Acting General Counsel had proven all of these essential elements, Fresh & Easy has shown that it had a legitimate, substantial business reason for Jackson to

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[3] Even if, as the Acting General Counsel argues, Elias was soliciting other employees' involvement in protected concerted activities, those employees have a clear right under Section 7 not to do so; and, presumably, to request the Company to evaluate Elias' possible restraint of their right. Fundamentally, the Acting General Counsel loses sight of the object of Elias' supposed concerted activities: to have Fresh & Easy investigate her complaint, *i.e.*, to inquire into the relevant circumstances.

inquire about Elias' witness statement, and to request her not to obtain any further such statements during the investigation she sought into her personal sexual harassment complaint.

II. FACTS

A. Respondent's Business Operation And Personnel

Fresh & Easy operates a chain of supermarkets in California, Arizona, and Nevada. As the Acting General Counsel indicates, the store at issue in this matter is located at 7127 East Shea Boulevard in Scottsdale, Arizona. GC 1(e).

Jeff Lang ("Lang") is the Company's District Manager; Jackson, as noted, is an Employee Relations Manager, who works out of Fresh & Easy's corporate office in El Segundo, California. Bruce Churley ("Churley") is the Scottsdale Store Manager. Mike Anderson ("Anderson") is a Team Leader, and a statutory supervisor. ALJD 3.

In addition to Elias, a customer assistant, other pertinent statutory employees are customer assistants Krista Yates ("Yates") and Gary Hamner ("Hamner"), and kitchen table associate Victoria Giro ("Giro").[4] *Id.*

B. The Events Of August 25-27, 2011

On about August 25, 2011[5], Elias asked Churley if she could participate in "TIPS" training, which is related to the sale of alcohol in the store. Churley told Elias to write a note on the whiteboard in the employee break room to remind him of the request. As per his request, Elias did so. ALJD 5.

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[4] Giro left Fresh & Easy's employment in December 2011, prior to the hearing. ALJD 3.

[5] The ALJ's Decision describes the TIPS training request as occurring on August 24. ALJD 5.

At some point during Elias' shift on August 26, another employee -- later determined to be Hamner -- changed the "TIPS" reference to "TITS," and also drew a peanut-like figure holding what appeared to be a smoking cigarette, or a "worm pissing on" Elias' name. Tr. 15-16, 116-117; GC 5. *See also* ALJD 5.

Sometime after 5:00 p.m. on the 26th, Elias called Anderson ("Anderson") into the breakroom to show him what was written on the whiteboard, and to inform him that she wanted to file a sexual harassment complaint with the Company. Tr. 38-39, 56, 117, 126, 129. *See also* ALJD 5-6.[6]

Shortly thereafter, Anderson called Churley, who was driving home following the end of his shift, regarding the whiteboard incident.[7] Anderson informed Churley that Elias was filing a sexual harassment complaint. Churley told Anderson to have a picture taken of the whiteboard, and went back to the store to view the picture, *i.e.*, GC 5. *See also* ALJD 6. After arriving, Churley spoke to Elias to ask how she was doing. At first she was upset, but then calmed down and continued to work. While back at the store that night, Churley viewed Anderson's picture, and also examined videotape of the breakroom which showed that Hamner had changed the whiteboard. Tr. 16-18. 25-27, 36, 39-40. *See also* ALJD 6-7.

Prior to Churley's returning to the store, and while the store was still open and servicing customers, Elias first approached Anderson with a depiction of the whiteboard, GC 6, and sought

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[6] The Acting General Counsel cites ALJD 5-6 for the proposition that Elias "believ[ed] other employees would also be offended[.]" The ALJ made no such finding. To the contrary, the ALJ found that Elias "testified that the sole purpose of [her statement] was to be a witness statement; it was neither a joint petition nor a joint complaint of everybody signing[.]" ALJD 6.

[7] Elias' and Churley's shifts overlapped for three (3) hours that day, but Elias did not bring the whiteboard to his attention during that period. Instead, she was upset about not having been recommended by Churley for Options training, *i.e.*, training to become a lead or supervisory employee. Tr. 27-28. *See also* ALJD 6.

to have him sign it as a witness statement.[8] At hearing, Elias confirmed that the sole purpose of GC 6 was as a witness statement, had no other function, was not a petition, and was not a joint complaint on behalf of any other employees. Elias similarly acknowledged that she did not ask any other employees to join her personal complaint, and none offered to do so. Tr. 132-133. *See also* ALJD 6.

In soliciting Anderson's signature on her witness statement, Elias was upset, "getting really angry," and "awfully loud." Anderson was "scared" by her and afraid that Elias was going to hit him. Anderson initially did not want to sign the statement, but did so "just to calm her down because she was getting irate." Tr. 40-44, 49-51. Yates witnessed Elias yelling at Anderson "in his face" to sign the statement, that he did not wish to do so, and that it sounded like Elias as a result was accusing Anderson of sexual harassment. Tr. 98-100; ALJD 7. The ALJ's findings essentially reflect Anderson's and Yates' account. ALJD 10.

At hearing, Anderson indicated that GC 6 was an altered version of the witness statement he had signed. Elias subsequently added content to the statement without Anderson's consent, including the declaration: "I TAKE THIS AS SEXUAL HARASSMENT." Tr. 41-42, 48-49; GC 6; ALJD 5 n. 4. The ALJ found that after obtaining Anderson's signature (and that of Yates and Giro) on her witness statement, Elias then changed the statement. He specifically discredited Elias' assertion that she did not. ALJD 10.

After Anderson signed Elias' witness statement, she then sought to have Yates sign -- following her around the store while it remained open. Tr. 90, 111. Yates told Elias several times that she felt pressured by her and uncomfortable in signing the statement. Tr. 98, 100. At

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[8] By its terms, GC 6 includes signatures from "witnesses." As Elias testified, since non-supervisory personnel may not take pictures in the store, "probably the best thing to do" would be to "put [the picture] on a piece of paper and then make a statement, which I did." (Tr. 118).

hearing, Yates confirmed that she felt scared and did not want to be involved in Elias's sexual harassment complaint. Tr. 102. She finally signed the statement because "[Elias] had been in [her] face, she was getting more aggravated, more hostile. [Yates] felt bullied, really. And without being able to, you know, call for HR help or anything, [she] figured the fastest way to diffuse to escalating situation was to sign and deal with it later." Tr. 101. Yates understood Elias' statement to be only a witness statement.[9] Tr. 103. *See also* ALJD 7-8, 10.

At hearing, Yates also stated that GC 6 was an altered version of what she had signed, including that the declaration "I TAKE THIS AS SEXUAL HARASSMENT" was not in the document. Tr. 92, 98, 105. *See also* ALJD 5 n. 4.

Yates filed a complaint, R 6, against Elias on the evening of the 26th through the Company's Ethics Point human resources hotline, alleging that Elias added content to the witness statement she signed, and that she was made uncomfortable by Elias, having informed her that "she did not agree" with her personal complaint. Yates was concerned that "because [she] had not signed an official document, things were not taken through HR and spoken to, that [Elias] may have taken her own documentation and added more information to what [she] had been bullied into signing." Yates made her Ethics Point complaint on her own; no one at the Company told her or pressured her to file it. Tr. 112-113. *See also* ALJD 8. Yates' Ethics Point complaint was transmitted to Jackson to investigate. Tr. 101-103, 105.

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[9] By Elias' own testimony, she was not requesting or engaged in concerted activity: "I asked [Yates] if she wanted to sign as a witness. I said, you know -- I says, you don't have to. I says, If you want to, you could, you know, just to what you observed on the board. And so, she signed it. ... I was explaining the statement to them and asked if they wanted to be witnesses." Tr. 119 (emphasis supplied). *See also* Tr. 138-139 ("And when I explained to them what it was and asked them if they wanted to be a witness, I told them they didn't have to sign it but if they wanted to sign as a witness that they could."); ALJD 6.

After Yates, Elias approached Giro to sign her witness statement. Giro considered what had been written on the whiteboard to be inappropriate, but told Elias that she should have brought the situation to Churley's attention while he still was at the store. Tr. 60. Giro did not find Elias' sexual harassment complaint to be "fair," and did not want to join in it. Tr. 61, 73-77; R 1. *See also* ALJD 7, 10-11.

Giro understood Elias' witness statement to be merely a "duplication of what was on the whiteboard." Tr. 62. She did not remember the declaration "I TAKE THIS AS SEXUAL HARASSMENT" to be part of the document she signed, nor did she recall other portions of GC 6 being contained therein. Tr. 63, 74. Giro considered it "possible" that Elias' witness statement could have been changed after she signed it. Tr. 74. *See also* ALJD 5 n. 4.

Giro signed Elias' witness statement because she "wanted to get out of there," felt "'pressure'" to sign the statement, "'did not want to have her any more upset or upset with [her],'"and was concerned about Elias approaching her in front of customers and customers being abandoned. Tr. 65, 72, 85-87, 120; R 3. *See also* ALJD 7, 10-11. Elias admits -- and there is no dispute -- that she was not following Company policy by leaving her duties at the cash register at the front of the store with customers waiting. Tr. 137.

It is undisputed that neither Anderson, Giro, or Yates had any involvement in preparing Elias' witness statement; ever were provided a copy of it; requested the Company to do anything in connection with the whiteboard incident; were participating in any protest or petition by Elias; were asked by Elias to join such an action; nor, offered to nor had any interest in doing so. Tr. 50-51, 74-75, 84, 102-103, 105. *See also* ALJD 10-11. Similarly, there is no dispute that Elias described her statement to them as solely a witness statement and communicated no other purpose for it. Tr. 50-51, 57, 74, 91, 93, 103. *See also* ALJD 6.

The next evening, on August 27, Churley sent an e-mail to Lang -- with a copy to Jackson -- which included relating assertions by Anderson, Giro, and Yates to him that Elias "'demanded' they sign a witness statement regarding the picture that was drawn in the breakroom ... [and that] [b]oth Victoria and Krista felt that they felt intimidated into signing something that they did not want to be a part of." R 1; Tr. 18, 31-32, 165, 167.[10] *See also* ALJD 7. Thereafter, Churley spoke with Jackson regarding the situation, advising her that Elias was upset and that Hamner appeared on videotape as having altered the whiteboard. Tr. 19-20. Jackson was responsible for conducting the Company's investigation into Elias' sexual harassment complaint, as well Yates' Ethics Point complaint against Elias and a complaint filed against Elias by Hamner on August 27. Tr. 36, 166, 168.

C. Jackson's Investigation Of The Complaints

As part of Jackson's investigation into the three complaints, she spoke with Anderson and Yates on August 30. *See* ALJD 8-9. Yates confirmed with Jackson the allegations in her Ethics Point complaint, underscoring Elias' screaming, and that Yates did not want to sign the witness statement, but did so to avoid Elias' escalating unwelcome conduct. Tr. 169-170. Anderson similarly described inappropriate behavior by Elias in obtaining the witness statement. Tr. 170. Anderson also gave Jackson a written statement, *i.e.*, R 2. Giro, who had been on vacation on

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[10] Anderson had confirmed to Churley that he did not want to sign Elias' witness statement, but "felt forced." Tr. 29. Anderson also told Churley that he was concerned that there was room on Elias' witness statement for her to alter it. Tr. 51. When Churley spoke with Yates the next day, prior to sending his e-mail to Lang and Jackson, she "pretty much said the same thing Mike did, that she didn't want to sign it but she felt she had no other choice, that she just wanted to calm things down." *Id.*; Tr. 34, 111-112. Yates also underscored her concern that there was room on Elias' statement for it to be changed. Tr. 95. Churley had a similar conversation with Giro on the 27th before sending his e-mail which was [p]retty much along the same lines." Giro, moreover, was disturbed by Elias having abandoned her position at the front of the store, leaving it unserviced and unguarded. *Id.*; Tr. 31, 34, 70, 73, 77, 85-87.

August 30, furnished a written statement to Jackson through Churley on September 1, R 3.[11] Yates also submitted a written statement to the Company, R 4. Tr. 168, 171.

At hearing, Elias acknowledged that having filed her sexual harassment complaint, she expected the Company to follow up and understood that an investigation would be conducted. Tr. 130. Elias recognized that Fresh & Easy had received her complaint as of August 26. Tr. 135, 166. *See also* ALJD 6.

On August 31, Jackson spoke with Elias by telephone regarding the three complaints. Pertinent to the Acting General Counsel's exceptions, the ALJ found that "she told Elias not to obtain any further [witness] statements so that she, Jackson, could conduct the investigation, although she could talk to the employees about the incident and ask them to be witnesses for her, but to allow her to complete the investigation. She said this because Elias made the employees uncomfortable."[12] ALJD 10-11; Tr. 172-173, 183. *See also* Tr. 187-188 (Jackson requested that Elias not obtain statements in the context of the investigation); ALJD 9.

Along these lines, Elias admitted that Jackson did not tell her that she could not speak to other employees generally about her sexual harassment complaint, did not tell her she could not

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[11] At hearing, Anderson affirmed R 2's truthfulness, as did Giro as to R 3, and Yates as to R 4. Tr. 52-53, 72. 102.

[12] The ALJ credited Jackson and discredited Elias' account of the August 31 conversation "[w]ithout much difficulty[.]" ALJD 11. Elias had claimed that Jackson "told me that I was wrong for getting employees -- getting statements from employees. And I explained that I didn't get statements from employees, that I prepared a statement and requested that the employees sign the statement to what they observed on the board. And Ms. Jackson said that I was violating a company policy, and she didn't tell me what policy I was violating[.]" Tr. 123-124, 144, 154. By Elias' own account, she again underscored that she was not engaged in concerted activity, but merely obtaining witness verification of her own personal complaint. Moreover, Elias did not rebut Jackson's testimony that she told Jackson that "she didn't mean to make the employees uncomfortable and apologized." Tr. 173, 194-195.

identify employees as witnesses, and did not tell Elias that she was prohibited from talking with other employees about harassment in the future. Tr. 146-147. *See also* ALJD 9.

The ALJ found that Jackson did not tell Elias that "she was wrong" to obtain the witness statement, nor told Elias that she had violated any Company policy in doing so. ALJD 11. To the contrary, Jackson stated that Elias had asked her if she did anything wrong and Jackson told her no. Jackson did not restrict or restrain Elias in any way with respect to any future harassment complaints. Tr. 173.

Elias was not contacted again by Jackson, but was requested to submit statements regarding the various complaints, including Elias' sexual harassment complaint. Tr. 125. On September 3, Elias e-mailed Jackson her statement regarding her personal complaint. Tr. 125, 140; GC 7. *See also* ALJD 8. She never provided the Company with her witness statement. Tr. 33, 156, 172. Elias admitted that in her contemporaneous September 3 statement, she did not assert that Jackson threatened her in any way, disciplined her, threatened her with discipline, or acted inappropriately towards her in any way. Tr. 140. She also acknowledged that her statement did not contend that her sexual harassment complaint was a joint complaint. Tr. 141. Elias further confirmed that she did not file an Ethics Point or other internal complaint against Jackson. Tr. 141-142.

Elias acknowledged that after Jackson completed her investigation of Elias' sexual harassment complaint, she e-mailed Elias confirming that the investigation was closed, "and that if there was any retaliation that [she] was to notify [Jackson]." Tr. 125, 174; R 5. *See also* R 13-14; Tr. 183-184; ALJD 8. Elias understood this to be so and admitted that in Jackson's notification, there is no indication that she was being or had been threatened, disciplined, or treated adversely in any way. Tr. 146. To the contrary, Jackson informed her that she found

merit in her complaint (*i.e.*, that inappropriate conduct had occurred regarding the whiteboard) and that the Company had taken corrective action. R 5.

It is undisputed that Elias never received any discipline for having Yates, Giro, and Anderson sign her witness statement, nor was she threatened with any such discipline or treated adversely in any way as a result. Tr. 32, 53, 77-78, 144-146, 173-174. Nor did Elias receive any discipline for threatening or intimidating other employees; or, for anything related to the whiteboard incident or its aftermath. Tr. 48-49, 128. *See also* ALJD 9. Moreover, none of the statutory employees was aware of any Company policy or "rule" which prohibits them from discussing sexual harassment complaints or obtaining witness statements in support of such complaints. Tr. 78.

III. ARGUMENT

A. The Acting General Counsel Did Not Establish Any Of The Elements Of A Section 8(a)(1) Violation

The ALJ's Decision should be adopted and the Section 8(a)(1) allegations involving Jackson dismissed because the Acting General Counsel did not establish any of the predicates to a violation: (1) Elias was not engaged in concerted activities; (2) her activities at issue were not for the purpose of "mutual aid or protection;" (3) her conduct was not protected by the Act; and (4) she was not restrained, etc., in the exercise of any rights guaranteed by Section 7.

Even if the Acting General Counsel had proven all of these essential elements, Fresh & Easy has shown that it had a legitimate, substantial business reason for Jackson to inquire about Elias' witness statement, and to request that she not to obtain any further such statements in connection with the investigation she sought into her personal sexual harassment complaint.

1. Elias Was Not Engaged In Concerted Activities

The evidence is clear that Elias was not engaged in concerted activities as to her personal sexual harassment complaint, and her obtaining signatures on her witness statement related to that complaint.

Elias acknowledged that the sole purpose of GC 6 was as a witness statement regarding her own complaint. She admitted that it had no other function, was not a petition, and was not a joint complaint on behalf of other employees. Notably, Elias further admitted that she did not request other employees to join her personal complaint, and none offered to do so. Moreover, it is undisputed that neither Giro nor Yates (nor Anderson) had any involvement in preparing Elias' witness statement; ever were provided a copy of it; requested the Company to do anything in connection with the whiteboard incident; or were participating in any protest or petition by Elias. *Supra*, pp. 5 n. 6, 6-9. *See also* ALJD 6,11.

GC 6, on its face, provided for signatures by "witnesses."[13] All of the signatories -- Anderson, Giro, and Yates -- were solicited by Elias on the basis that GC 6 merely was a witness statement, and only understood it to be such. Indeed, both Giro and Yates -- the only other statutory employees involved in the matter -- affirmatively told Elias at the time that they did not agree with her personal sexual harassment complaint and did not want to be a part of it. *Supra*, pp. 6-8. *See also* ALJD 6, 11. There was nothing mutual or concerted about Elias' activities.

The ALJ's conclusion in this regard was appropriate and consistent with established Board law. ALJD 11 ("In *Five Star Transportation, Inc.*, 349 NLRB 42, 43 (2007) *citing Meyers Industries (Meyers I)*, 268 NLRB 493 (1984) and *Salisbury Hotel, Inc.*, 283 NLRB 685

[13] At hearing, Anderson, Giro, and Yates all testified that none of them endorsed the declaration on GC 6: "I TAKE THIS AS SEXUAL HARASSMENT;" and, indeed, the ALJ found -- in discrediting Elias -- that she had altered the witness statement after it was signed. *See* ALJD 10.

(1987), the Board stated that concerted activities within the meaning of the act encompassed conduct 'engaged in with or on authority of other employees, and not solely by and on behalf of the employee himself.'").

Given the facts of this case, the cases cited by the Acting General Counsel on pages 9-10 of its Brief are inapposite. Elias' activities were personal, and were intended and communicated to other employees as such.

Elias' self-serving testimony that she subjectively "believed" her fellow female co-workers also were offended by the whiteboard incident, GC Brief, p. 4, contradicts her admissions that she was acting only on her own behalf and not pursuing concerted activities. The ALJ did not credit her testimony regarding her alleged belief, nor found that she so believed. There is no evidence that she communicated such a belief or purpose to any other employee; but, emphasized the individual nature of her actions. Moreover, the Acting General Counsel correctly argues that the standard of concerted activity "'is an objective one.'" *Id.*, p. 9 (*quoting Circle K. Corp.*, 305 NLRB 932, 933 (1991), *enfd.* 989 F.2d 498 (6th Cir. 1993)).

The Acting General Counsel also misstates the holding of *El Gran Combo*, 284 NLRB 1115 (1987). *See* GC Brief, p. 10. It is not enough to merely have "a speaker and listeners" to have concerted activity. The Board was clear there that "'to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.'" 284 NLRB at 1117 (*quoting Mushroom Transportation Co. v. NLRB*, 330 F.3d 683, 685 (3rd Cir. 1964)). Elias was not initiating, etc., group action. Rather, she acknowledged the precise opposite.[14]

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[14] That alleviating unlawful discrimination of the workplace is presumed to be in the interest of all employees, as the Acting General Counsel contends, GC Brief, p. 10, does not mean that particular activities related to such a general concern themselves are concerted in

2. Elias' Activities Were Not For The Purpose Of "Mutual Aid Or Protection"

Likewise, Elias' activities were not for the purpose of "mutual aid or protection," as Section 7 of the Act requires. *See* 29 U.S.C. § 157.

The instant situation is similar to that described in *Holling Press, Inc., supra.* In *Holling Press*, the Board held that "[i]n order for employee conduct to fall within the ambit of Section 7, it must be both concerted and engaged in for the purpose of 'mutual aid or protection.' These are related but separate elements that the General Counsel must establish in order to show a violation of Section 8(a)(1)." 343 NLRB at 302 (emphasis supplied).

The circumstances showing a lack of mutual purpose in *Holling Press* are virtually identical to the present facts. There, the Board found significant that the employee was advancing an individual sexual harassment claim; there was no evidence that other employees shared her concerns or had experienced analogous ones; no other employee had an interest in the Charging Party's harassment claim; and the Charging Party had engaged in "aggressive tactics" which further undermined any notion of mutuality. *Id.* at 302-303. The same factors exist here. *See supra* at pp. 5-8.

The Acting General Counsel tacitly concedes that *Holling Press* governs this case by arguing for it to be overturned. *See* GC Brief, pp. 11-12. There is no basis for doing so here.

The alleged "well established [Board] precedent" cited by the Acting General Counsel as supporting abrogation of *Holling Press* is limited to a single decision: *Meyers Industries, Inc. (II)*, 281 NLRB 882 (1986). The Acting General Counsel bases its argument on *Meyers II*'s indication that "employees' resort to 'administrative and judicial forums'" might constitute

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nature. By its express terms, the protection of Section 7 of the Act only extends to such activities, not all activities. *See Holling Press, Inc.*, 343 NLRB 301, 303-304 (2004).

activity for "mutual aid or protection." *Id.* at 887 (citation omitted). Even if so, Jackson's conduct here related to Elias' (and other employees') resort to the Company's complaint procedures, not to any government forum. The Acting General Counsel's invocation of *Meyers II* is a straw man.

Further, the evidence is indisputable that the two other employees whom Elias claimed she "believed" might be offended by the whiteboard incident -- Yates and Giro -- affirmatively wanted no part of Elias' personal complaint. *See supra* at pp.6-8; ALJD 11. *Meyers II* itself underscores that "it is protection for joint employee action that lies at the heart of the Act." (footnote omitted). 281 NLRB at 884. No "mutual aid or protection" was proposed by Elias nor desired by other employees.[15]

If anything, *Meyers II* -- and *Eastex, Inc.*, 437 U.S. 556 (1978), which the Acting General Counsel also cites, GC Brief, p. 11 -- emphasize that: "it was appropriate for the Supreme Court in *Eastex* to consider that 'at some point' the relationship between some kinds of concerted activity and 'employees' interests as employees' may be 'so attenuated' that it cannot 'fairly be deemed to come within the "mutual aid or protection clause[.]"'" 281 NLRB at 888 (citation omitted). *Holling Press* is consistent with such an approach, and the present facts fall squarely within it.

3. Elias' Activities Were Not Protected Under The Act

Even if Elias' activities were both concerted and for the purpose of "mutual aid or protection," they were not protected under the Act. The ALJ found -- and the Acting General

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[15] *Holling Press* only has been distinguished once by the Board. In *Ellison Media Co.*, 344 NLRB 1112 (2005), the Board did not apply *Holling Press* in a situation where the Charging Party had reported a supervisor's "offensive remarks to management," and then supported another employee's efforts to complain about similar conduct. The Board found *Holling Press* to be "clearly distinguishable" on that basis, which likewise is distinguishable from the instant controversy. *Id.* at 1114 n.7.

Counsel does not except to such findings -- that in obtaining signatures on her witness statement, Elias was "loud and angry," "annoying" to other employees and was "disruptive to the store's operations." ALJD 11. Anderson, Giro, and Yates all felt pressure and coercion in signing Elias' witness statement. Anderson and Yates, in particular, were emphatic that they did not want to do so -- to the point where Yates filed an Ethics Point complaint with the Company over Elias' conduct. *Supra*, pp. 6-8. Further, Elias altered her witness statement without the consent of the signatories. *See* ALJD 10. The Acting General Counsel likewise does not except to that finding.

Section 7 does not protect Elias' harassing and disruptive workplace conduct, or her falsifying a witness statement. *See, e.g., Ogihara Am. Corp.*, 347 NLRB 110 (2006); *BJ's Wholesale Club,* 318 NLRB 684 (1995); *UPS, Inc.,* 311 NLRB 974 (1993); *Canadaigua Plastics,* 285 NLRB 278 (1987).

If, as the Acting General Counsel contends, Elias was involved in protected concerted activity, Giro and Yates possessed the fundamental Section 7 right to refrain from doing so in an atmosphere free of restraint, threats, and coercion. An employer does not violate the Act by enforcing such rights and investigating their alleged denial. *Neufeld Porsche-Audi Inc.*, 270 NLRB 1330, 1334 (1984) ("...[T]he Board should not and cannot compromise the neutrality of the Act ...[f]or to do so is to ignore the literal prescription of Section 7 that the Act protects, with equal vigilance: the rights of employees to engage in and to refrain from union or other concerted activities.").

Against this backdrop, Jackson did not violate Section 8(a)(1) by inquiring into Elias' unprotected conduct, and requesting that she not obtain any further witness statements in connection with her personal sexual harassment complaint.

4. Elias Was Not Restrained, Etc., In The Exercise Of Protected Concerted Activities

Elias also was not restrained, etc., in the exercise of any protected concerted activities. She filed her sexual harassment complaint, and it was duly investigated by the Company, with Fresh & Easy ultimately taking corrective action against the perpetrator. *Supra*, pp. 11-12; ALJD 11.

Nor was Elias prevented from submitting her signed witness statement to the Company. Rather, she chose not to provide it to Jackson. There were no additional witnesses to the whiteboard incident from whom Elias sought to obtain signatures.

It is undisputed -- and Elias admits -- that she received no discipline, threats of discipline, or any adverse treatment in connection with the whiteboard situation, or her obtaining signatures on her witness statement. It is equally undisputed that in closing the investigation into Elias' sexual harassment complaint, Jackson on behalf of the Company made clear that she would not experience any retaliation in connection with her complaint, and Elias understood this to be so.[16] *Supra*, pp. 10-12; ALJD 10-11.

Moreover, it is undisputed that Jackson's request (to Elias alone) that she not obtain any further witness statements was narrowly tailored and limited in scope and time to Elias' particular complaint and her conduct as reported to the Company by other employees. It likewise is undisputed that Jackson did not request or tell Elias not to engage in any activity in any future matter. *Supra*, pp. 7-9; ALJD 9. There was no Section 8(a)(1) violation for this reason as well.

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[16] Along these lines, the Acting General Counsel does not except to the ALJ's dismissal of the Complaint allegation that Elias had been "threatened" with "unspecified reprisals."

B. Even If Elias' Activities Were Protected Under The Act, Jackson Had A Legitimate, Substantial Business Justification For Her Actions

Even if Elias' activities were protected by the Act, Jackson on behalf of Fresh & Easy had a legitimate, substantial business justification for her actions.

In *Caesar's Palace*, 336 NLRB 271 (2001), the Board held that an employer did not violate Section 8(a)(1) by instructing employees not to discuss an ongoing drug investigation with fellow employees, interrogating an employee concerning whether other employees had discussed the investigation; and, indeed, discharging employees because they did so. *See also* ALJD 11 n. 5.

The Board found in *Caesar's Palace* that the employer demonstrated such a justification, and balancing the asserted business justification with the effect on employee rights warranted dismissal of the complaint. *Id.* The Board noted that the employer's rule was in place during the investigation itself, and was "to ensure that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated." *Id.* at 271.

Here, similar considerations were present. Jackson was responding to a specific set of circumstances initiated by the employees themselves.[17] They approached management to

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[17] There was no broader "rule" generally directed at employees. *See* ALJD 9 ("[Jackson' did not tell Elias that she had violated any company policy[.]"). There is no evidence whatsoever -- and the Acting General Counsel cites none -- that any other employee understood such a "rule" existed, or was requested not to obtain witness statements in connection with a sexual harassment complaint. *Supra*, p. 12. The Acting General Counsel's alternative argument, that "Jackson's directive to Elias should have been viewed as an unlawful oral re-promulgation of Respondent's unlawful solicitation/distribution rule," GC Brief, p. 16, is completely off the mark. Here, again, the Acting General Counsel references no evidence that Jackson was asserting such a policy, or that Elias understood her to be doing so. To the contrary, not only did Jackson not tell Elias she was violating any general Company policy, ALJD 9, even Elias -- who was discredited -- testified that Jackson did not identify any policy she supposedly was violating. Tr. 142-143. Equally fundamentally, the ALJ found that Fresh & Easy's solicitation policy had been lawful since September 2009. ALJD 9.

complain about Elias' conduct. Yates went so far as to file an Ethics Point complaint with the Company over it. The ALJ confirmed that Elias's behavior in soliciting signatures for her witness statement indeed was inappropriate and disruptive, and the Acting General Counsel does not except to that finding.[18] Moreover, Yates and Anderson both expressed concern that Elias had altered the witness statement they signed without their permission -- which the ALJ found occurred, and as to which the Acting General Counsel also does not except. *Supra*, pp. 6-7; ALJD 9-11.

Accordingly, Jackson had *bona fide* reasons to inquire into Elias' witness statement and ask her not to obtain further such statements. Elias' behavior compromised the integrity and objectivity of the investigation of her own complaint. Having herself invoked the Company's complaint procedures, it was reasonable for Jackson to request that Elias allow Jackson to undertake the investigation she sought, and for those protocols to be followed in an unbiased manner.[19]

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[18] Ironically, the Acting General Counsel cites that Elias was not disciplined for threatening or coercing Anderson, Giro, or Yates as evidence of a Section 8(a)(1) violation. GC Brief, p. 14. Whether she received discipline, however, is a different consideration than whether Elias actually engaged in such conduct. That issue was duly considered by the ALJ, he found that she did so, ALJD 9-11, and the Acting General Counsel does not except to such finding. Indeed, such a finding is not necessary for the Board to determine that Jackson had a legitimate, substantial business justification for inquiring about Elias' witness statement and requesting her not to obtain further such statements. Indisputably, Jackson spoke to Elias on the basis of multiple, *bona fide* employee complaints regarding her behavior.

[19] *Phoenix Transit System*, 337 NLRB 510 (2002), cited by the Acting General Counsel, GC Brief, p. 15, does not suggest a different result here. In *Phoenix Transit*, the employer maintained a broad confidentiality rule well beyond the bounds of an ongoing investigation into a harassment complaint. The Board contrasted *Caesar's Palace* where, as in the instant case, there was a limited restriction on certain employee conduct to avoid fabrication of evidence. *Id.* Avoidance of operational disruption and inappropriate conduct towards potential witnesses presumably would be considerations of equal concern. For the Acting General Counsel to claim that "[n]one of these considerations are present in this matter," GC Brief, p. 15, is patently incorrect where the ALJ determined that they were in unexcepted findings. ALJD 9-11. Likewise, the ALJ specifically found that Jackson told Elias "she could talk to the employees

Jackson's request was narrowly tailored to the limited period of the investigation and the scope of the particular employee complaints. *See Lockheed Martin Aeronautics*, 330 NLRB 422, 423 (2000)[20]; Elias admitted that Jackson did not tell her that she could not speak to other employees generally about her sexual harassment complaint, did not tell her she could not identify employees as witnesses, and did not tell Elias that she was prohibited from talking with other employees about sexual harassment in any future circumstance. *Supra,* pp. 10-12; ALJD 9. Accordingly, Jackson's conduct was justified consistent with governing Board law.

With respect to the interrogation allegations specifically, Jackson's inquiry as to Elias' witness statement directly resulted from employee complaints to the Company (including by both Elias and Yates), and invocations of Fresh & Easy's human resources function. There is no indication whatsoever that Elias did not willingly speak to Jackson. Moreover, the evidence is clear that Jackson's inquiry was focused exclusively at the employee-generated complaints.[21] To

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about the incident and ask them to be witnesses for her[.]" ALJD 10. There was no prohibition of employees discussing sexual harassment complaints either then or in the future -- only a request that Elias not obtain further witness statements in connection with her personal sexual harassment complaint under investigation. ALJD 9.

[20] *See also Charles Schwab & Co., Inc.*, JD (SF)-79-04 (Meyerson, ALJ) at pp. 19-20 ("The facts establish that the Respondent has no *per se* rule against employees discussing questions of sexual harassment. Rather, acting on the basis of information given to her by [employees], [Respondent] requested that [employees] refrain from discussing the matter with fellow employees. The entire matter was resolved within a week of [the] oral request, and the investigation was concluded. It seems to me that for that limited period of time, the request for confidentiality was entirely reasonable. It would certainly serve the useful purpose of protecting [employees] against retaliation, protect the integrity of the investigation, and encourage witnesses to come forward. ... Although [Respondent's] request to keep the matter confidential could have a brief chilling effect on the right of employees to discuss the claim of sexual harassment, it was certainly limited in time and scope. Further, any such intrusion on its employees' exercise of Section 7 rights was outweighed by the Respondent's substantial business justification for seeking confidentiality.") (*citing Caesar's Palace, supra*).

[21] For example, Elias did not testify that Jackson asked or spoke about any other workplace matter. *Supra*, pp. 10-12.

the extent that Jackson even arguably touched upon protected concerted activity, she had a legitimate, substantial business justification for doing so. *See Caesar's Palace, supra.*

In *Charles Schwab*, *supra,* which addressed similar circumstances, the ALJ examined investigation-related interviews from a "more traditional viewpoint":

> Traditionally, the Board looks to the 'totality of the circumstances' in determining whether a supervisor's questions to an employee about her protected activity were coercive under the Act. *Rossmore House*, 269 NLRB 1176 (1984) []. In *Medcare Associates, Inc.*, 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as '*Bourne* factors," so named because they were first set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964). These factors include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation and the truthfulness of the reply.

p. 22. *See also* ALJD 11. Similar to here, the ALJ in *Charles Schwab* found significant that the investigation in question was initiated by the Charging Party's own harassment claim, and that the human resources representative was "merely investigating those allegations[.]" *Id.* "Under such circumstances, the questioning is unlikely to be found coercive." *Id.* (citing *Phillips-Van Heusen Corp.*, 165 NLRB 1, 16 (1967)).

In *Charles Schwab*, the ALJ was

> of the view that the 'totality of the circumstances' ... makes it apparent that [the human resources representative] was merely doing what the law required of her, which was to take seriously, immediately investigate, and put a stop to any sexual harassment that may have been occurring. There was nothing coercive about [the representative's] questions. Moreover, it seems to me that having initiated the claims of sexual harassment and inappropriate conduct, [the Charging Party] is hard pressed to now contend that [the representative's] efforts to investigate those claims created a restraint upon her protected activity.

Id. The ALJ's decision in *Charles Schwab* is not binding on the Board. But his reasoning and application of Board precedent are equally apt in the instant matter.

In contrast, the Acting General Counsel's treatment of the *Rossmore House* and *Bourne* factors is wholly off base. First, the Acting General Counsel claims that "Jackson's questioning

takes place against a background of hostility." GC Brief, p. 18. However, the alleged basis for the "hostility" includes rules there is no evidence Elias was aware of, or had any relation to the instant situation; a complaint by a non-supervisor (Hamner) which Jackson found to be meritless; and complaints related by supervisors as to Elias' conduct which the ALJ determined to have occurred, and as to which the Acting General Counsel does not except.[22] Far from being "hostile," Jackson was scrupulously fair and focused on the facts.

The Acting General Counsel's application of the other *Rossmore House* and *Bourne* factors here is equally illogical, and boils down to Jackson actually investigating the personal sexual harassment complaint which Elias brought to the Company.

Were the Board to adopt the Acting General Counsel's view of Section 8(a)(1) in this case, it would make it manifestly difficult for an employer to lawfully conduct a harassment investigation consistent with federal anti-discrimination provisions.

The Supreme Court holds that an employer is to "exercise[] reasonable care to prevent and correct promptly any sexually harassing behavior." *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indust., Inc. v. Ellerth*, 524 U.S. 742 (1998). Implicit in these holdings, and consistent with the EEOC's interpretative guidelines of Title VII of the Civil Rights Act of 1964, is the employer's affirmative duty to diligently investigate any claims of harassment.[23] Comity is appropriate for the policies inherent in Title VII and the Supreme Court cases that interpret it.[24]

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[22] For good measure, the Acting General Counsel acknowledges that Jackson "had never met or spoken to [Elias] before" -- they had no history. GC Brief, p. 18.

[23] *See EEOC Enforcement Guidance: Vicarious Employer Liability For Unlawful Harassment By Supervisors* (June 18, 1999) ("An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should . . . launch its investigation immediately . . . the

Even if Elias' conduct was protected under the Act, Fresh & Easy has established a legitimate, substantial business justification for inquiring into Elias' witness statement and requesting her to not obtain further such statements in connection with the investigation of her personal sexual harassment complaint.

C. Conclusion

For the foregoing reasons, the Acting General Counsel's exceptions should be denied, and the Board should adopt the ALJ's Decision.

Respectfully submitted,

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investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information.").

[24] *See e.g., Adtranz ABB Daimler-Benz Transp., Inc. v. NLRB*, 253 F.3d 19, 27 (D.C. Cir. 2001) (recognizing that employers are subject to liability if they fail to maintain a harassment-free workplace and, thus, the Board should interpret the Act in a manner which is sensitive to employers' responsibilities to address workplace harassment; "to bar, or severely limit, an employer's ability to insulate itself from such liability is to place it in a 'catch 22.'"); *Palace Sports & Entertainment, Inc.*, 342 NLRB 578, 579 (2004) ("We recognize that employers have a legitimate interest in preventing workplace sexual harassment and a correlative obligation to respond when such incidents occur."); *In re West Maui Resorts*, 340 NLRB 846, 850 (2003) ("It is not the Board's function to judge the propriety of how the Respondent chose to protect itself against a potential Title VII lawsuit."); *Lockheed, supra*, 330 NLRB at 423 ("We recognize that the Respondent has obligations under other statutes … that may in some circumstances justify the prohibition of certain kinds of conduct.").

CERTIFICATE OF SERVICE

This is to certify that a true copy of the Answering Brief of the Respondent was served via electronic mail this 15th day of June, 2012 upon:

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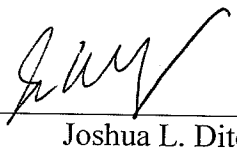

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